Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of:	
Structure and Practices of the Video Relay Service Program	CG Docket No. 10-51
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	CG Docket No. 03-123

COMMENTS OF SORENSON COMMUNICATIONS, LLC

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June 12, 2017

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I. INTRODUCTION AND BACKGROUND

Sorenson Communications, LLC ("Sorenson") files these comments in response to the Consumer and Governmental Affairs Bureau's Further Notice regarding use of the RUE Profile in hardware- and software-based endpoints distributed by providers of video relay services ("VRS").[1] Sorenson supports the Bureau's efforts to improve interoperability and further facilitate consumers' ability to change VRS providers. To that end, Sorenson is actively implementing the VRS Provider Interoperability Profile, developed by industry consensus and incorporated into the Commission's rules earlier this year. Sorenson is also working to implement the xCard standard to ensure that VRS users can transfer their contact lists from one VRS provider to another. Sorenson is cooperating with MITRE as it develops the Accessible Communications for Everyone or "ACE" Application and the National Test Lab, and Sorenson continues to be an industry leader in collaborating with other providers to prevent interoperability problems and address them when they do occur. Sorenson takes these efforts seriously and prioritizes them within its operations.

Requiring all VRS Providers to use the same technical standard for the development of their proprietary endpoints—the Relay User Equipment or "RUE" Profile—would be a poor addition to this list of initiatives. It would impose substantial costs for little if any benefit.[2]

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[1] *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, DA 17-76, 32 FCC Rcd. 687 (Consumer & Gov't Affs. Bur. 2017) ("*Further Notice*").

[2] *Id.* at 694 ¶ 25.

Since its origin in the 2013 *VRS Reform Order*, the RUE Profile has suffered a serious case of mission creep. As described in other filings,[3] the RUE Profile began as an effort, following the provider-developed VRS Provider Interoperability Profile, to guide the Commission's contractors in the development of the Commission's ACE App and to ensure that the ACE App could be used in conjunction with providers' VRS as well as interoperate with providers' proprietary endpoints on point-to-point calls. Its implementation in VRS provider-distributed endpoints goes beyond the scope of providing a reference platform or an open-source alternative software-based endpoint, and should not be required. Doing so would waste millions of dollars in industry and ratepayer resources while also deterring valuable innovation: the potential for the RUE Profile continually to expand the list of required functions over time would dampen investment in features development because incorporating those features into the RUE Profile then mandates sharing that feature among all VRS providers. The Commission long ago correctly recognized that features development is best left to the market and should not be the subject of mandatory sharing among VRS providers.[4]

Sorenson urges the Bureau and the Commission to focus on implementation of the VRS Provider Interoperability Profile and the xCard standard for contacts lists. Once those are implemented, the Commission can assess whether any further steps are needed.

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[3] *See, e.g.*, Sorenson Communications, LLC, Petition for Partial Reconsideration, or in the Alternative, Suspension of the RUE Implementation Date at 7-10, CG Docket Nos. 10-51 & 03-123 (filed May 30, 2017) ("Petition for Reconsideration") (appended as Attachment A).

[4] *See, e.g.*, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, Second Report and Order and Order on Reconsideration, FCC 08-275, 24 FCC Rcd. 791, 819-20 ¶ 63 (2008) ("*Second Report and Order*") (rejecting a request that providers be required to make enhanced features fully portable, and allowing "[p]roviders [to] offer such features on a competitive basis, which will encourage innovation and competition").

II. MANDATING COMPLIANCE WITH THE RUE PROFILE FOR PROVIDER ENDPOINTS WOULD DISSERVE CONSUMERS AND WASTE RESOURCES

The *Further Notice* seeks comment on requiring some or all VRS provider-distributed endpoints to comply with the RUE Profile.[5] The Commission should not require implementation of the RUE Profile in any VRS provider-distributed endpoints. Doing so would increase costs and stifle innovation in endpoint technology. A cost-benefit analysis will show that the burdens of implementing the RUE Profile in VRS provider-distributed endpoints far outweigh any conceivable benefits. The Commission should simply not require use of the RUE Profile.

A. Mandatory Compliance with the RUE Profile on Provider-Distributed Endpoints Would Increase Costs and Reduce Innovation

No VRS provider has come forward to support mandatory use of the RUE Profile in VRS provider-distributed endpoints; all providers filed comments and *ex partes* last fall opposing its use.[6] Clearly, VRS competitors are not interested in using the RUE Profile in proprietary endpoints as a way to increase interoperability or portability. This is not a surprise. Mandatory use of the RUE Profile in provider-distributed endpoints would substantially increase providers' costs, inject confusion regarding responsibilities for licenses and updates when consumers port their numbers, force providers to make hard choices about features not addressed in the RUE

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5 *See Further Notice*, 32 FCC Rcd. at 694 ¶ 25.

6 *See* Comments of ASL Services Holdings, LLC dba GlobalVRS in Response to Further Notice of Proposed Rulemaking at 9-10, CG Docket Nos. 03-123 & 10-51 (opposing use of the draft RUE Profile in provider-distributed endpoints, as it was not developed for that purpose); Comments of Convo Communications, CSDVRS, Purple Communications, and Sorenson Communications at 4, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) ("The Commission should not adopt the RUE Profile."); Comments of ZVRS on the VRS Interoperability FNPRM at 4, CG Docket Nos. 10-51 & 03-123 (filed Sept. 14, 2016) ("To require that all VRS user endpoints comply with a standard drafted under the above-described process would be procedurally improper and would have disastrous practical effects for VRS users and providers.").

Profile, and depress innovation. The Bureau should not mandate compliance with the RUE Profile in provider-distributed endpoints.

First, all providers have proprietary endpoints that they distribute. If a consumer using a provider-distributed endpoint ports to a new default provider, the consumer can simply obtain an endpoint from the new provider. As soon as implementation of the xCard standard is complete, the consumer will be able to quickly transfer existing contacts to that new endpoint. This is a straightforward process and does not require implementation of the RUE Profile.

Requiring compliance with the RUE Profile for any VRS-provider distributed endpoints would cause serious problems. For example, provider-distributed endpoints contain elements licensed from third-party vendors. If a customer receives an endpoint from one provider and ports it to another, who is responsible for paying for and maintaining the necessary licensing? Similarly, VRS endpoints require software updates, security patches, and bug fixes. Which VRS provider is responsible for those when the customer ports from the original default provider to another one? And then to another one?[7] When the endpoint fails or needs support, which provider is the user to contact—the one whose brand is on the endpoint or the default provider? Surely in all these cases it cannot be the original default provider, which no longer has a customer relationship with the end user and is no longer being compensated for the consumer's use of VRS unless the user opts to dial around. Yet there is no clear process for transferring these ongoing responsibilities to the default provider du jour. Of equal consideration, is every

[7] Indeed, the ACE Application will similarly require updates, security patches, and bug fixes, but there is no apparent plan for any entity to be responsible for maintenance and customer support of the application.

provider to learn how to support and configure Convo TV, Purple SmartVP, Z20, Z70, ntouch VP, and ntouch VP2, not to mention the many forms of software applications?

In addition, the RUE Profile is not suitable for use in consumer endpoints because it is in draft form[8] and lacks security as the profile does not resolve who validates endpoints and issues client certificates. The *Further Notice* asks "[w]hat specific aspects of the RUE Profile would subject networks to lower security."[9] The RUE Profile does not require the use of a client certificate, and if the client does have a certificate the profile is mute on who serves as the authorized issuing authority. Here, a client certificate would verify the authenticity and certification of the endpoint that originates a VRS call. Without an entity managing a certificate authority, and endpoints with certificates issued by that authority, providers could not distinguish between a call from a weaponized endpoint and one from another provider. This poses a security threat to VRS providers' networks, which are core to processing standard and emergency (911) calls, contain consumers' personal information, and are subject to privacy requirements to ensure the confidentiality of consumer information. The draft RUE Profile specifies that a client certificate is not mandatory and that providers may reject calls coming into their networks that lack a client certificate.[10] But rejecting calls from devices that comply with government standards is hardly consistent with functional equivalence.

Compliance would also substantially increase the costs of providing modern, innovative VRS features such as personal greetings and text support for video mail, disability-specific call

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[8] Indeed, the draft expired in January. *See* Internet Engineering Task Force, Interoperability Profile for Relay User Equipment (P. Kyzivat & H. Schulzrinne, eds., July 20, 2016) ("RUE Profile"), https://tools.ietf.org/pdf/draft-vrs-rue-dispatch-00.pdf.

[9] *Further Notice*, 32 FCC Rcd at 694 ¶ 25.

[10] *See* RUE Profile § 5.

notification functions such as haptic or light-activated devices, and automatic backup. Providers that wish to include these enhanced features on a RUE-compliant endpoint would have to design two versions of their features with associated changes in the user interface for each endpoint—the RUE-compliant version (which would remove, grey out, or generate error messages for the non-compliant features of the endpoint in the case of a port) and a separate version that maintains the many innovative enhancements they have developed. This would substantially increase providers' development, maintenance, and support costs.

At the same time, it would also reduce the incentive to innovate. As the Commission long ago recognized, allowing VRS providers to compete based on unique "enhanced features" will "encourage innovation and competition."[11] But if the Bureau proceeds down the path of mandating the RUE Profile for provider-distributed endpoints, VRS Providers will continually question whether any or all of the improvements they make to their service will either be ported to another provider or be added to the RUE Profile. Adding a provider's enhanced features to the RUE Profile would mean not only that its improvements will function on all other providers' systems but that all other VRS providers will be able to offer the same function in all of their own distributed endpoints, reducing competition. Putting aside the issues this creates around appropriate licensing arrangements for the intellectual property that a VRS provider creates when it develops a new feature, the threat of having new features conscripted into the RUE will go a long way toward ensuring they do not develop in the first place. The Commission should

[11] *Second Report and Order*, 24 FCC Rcd. at 820 ¶ 63.

"facilitate, rather than frustrate, innovation,"[12] especially when it concerns services for Americans with disabilities.[13]

B. The Costs of Implementing the RUE Profile Far Outweigh Any Benefits

Sorenson encourages the Commission to evaluate whether the costs to implement the RUE Profile in VRS provider-distributed endpoints are "truly justified"[14] by any benefits. The first step in such an analysis would be to identify the benefits.

As detailed above, there are no benefits from enhanced functionality. To the contrary, VRS providers would be required to eliminate valuable functionality from any endpoints subject to the RUE Profile mandate or manage two versions of features—one RUE-profile compliant and one with full functionality.[15] There are also no apparent benefits to interoperability, which is being addressed through other initiatives and not through implementation of the RUE Profile for provider-distributed endpoints.

The industry has developed a standard to govern interoperability (which the Commission has incorporated into its rules).[16] The VRS Provider Interoperability Profile is being

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[12] Ajit Pai, Chairman, FCC, Remarks at Carnegie Mellon University's Software Engineering Institute: Bringing the Benefits of the Digital Age to All Americans, at 6 (Mar. 15, 2017) ("*Benefits of the Digital Age*"), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343903A1.pdf.

[13] *See infra* pp. 12-14 (explaining that encouraging innovation in TRS services is a statutory requirement).

[14] Press Release, FCC, Statement of Commissioner Michael O'Rielly on Commission's Formation of an Office of Economics and Data (Apr. 5, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0405/DOC-344255A1.pdf.

[15] *See supra* p. 3.

[16] *See* 47 C.F.R. § 64.621(b)(1) ("Beginning no later than August 25, 2017, VRS providers shall ensure that their provision of VRS and video communications, including their access technology, meets the requirements of the VRS Provider Interoperability Profile."); *id.* § 64.621(c)(1)(i) (identifying the VRS US Providers Interoperability Profile).

implemented now and converts all VRS communications to the SIP format, greatly increasing interoperability among VRS providers and their endpoints. In addition, MITRE is building a national provider-to-provider interoperability testing laboratory, which will provide even greater transparency in identifying and addressing any interoperability issues. Furthermore, the issue about which the consumer groups have expressed the greatest concern—portability of personal contacts lists—is addressed by the xCard standard, which the Bureau adopted for implementation by October 24, 2017.[17] All these steps are in addition to the regular industry conferences and provider-to-provider engineering calls to address interoperability issues as they arise. Interoperability for "basic communications functions"[18] is covered by all these steps.

If the Bureau's goal is to facilitate porting, mandating compliance with this standard is a poor solution. As described, much has changed since the inception of the interoperability and portability requirements, and it is not at all clear that adoption of the RUE Profile will make any incremental improvements to what the Commission and the industry are already doing. Today every provider has multiple supported and maintained videophone software options, with most providers having hardware options that they prize as preferred over the competition.[19] Yet

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[17] *See Further Notice*, 32 FCC Rcd. at 693 ¶ 16; 47 C.F.R. § 64.621(b)(2).

[18] *Further Notice*, 32 FCC Rcd. at 694 ¶ 22.

[19] *See, e.g.*, C macOS, CONVO (last visited June 12, 2017), https://www.convorelay.com/macos/ ("Do more with less. 100% revamped. And the best way to experience calls on your Mac."); Solutions: SmartVP, PURPLE (last visited June 12, 2017), https://www.purplevrs.com/solutions ("Enjoy the best Video Relay Service (VRS) right in your living room. Communication has never been easier. Clear, reliable and comfortable. With Deaf-approved interpreters, SmartVP is made for *your* world."); Products: Z-70, ZVRS (last visited June 12, 2017), https://www.zvrs.com/services/products/z70/ ("Together, Cisco and Z have created a next generation video collaboration experience. With Cisco's cutting-edge hardware and sleek style, a capacitive touchscreen and Z's clean, intuitive user interface, the new Z70 is designed to bring stunning HD quality to your home or office communication."); ntouch VP2, SVRS (last visited June 12, 2016), http://www.sorensonvrs.com/ntouchvp2 ("Built

missing security patches that could create avenues for cyberattacks on VRS networks or expose users' private information including calling lists and logs, expired licenses, end-of-life endpoints, and consumer confusion are the likely results of requiring all devices to be RUE Profile-compliant.

Assuming that is the "benefit," it cannot be justified by the costs. Providers explained how implementation of the RUE Profile merely to support the ACE App would cost each provider multiple millions of dollars.[20] Implementation of the RUE Profile in VRS provider-distributed endpoints would add significantly more. Sorenson believes that the three-year costs of implementing and maintaining the RUE Profile for all of its endpoints would be approximately $18.2 million, which should not be surprising given the Commission's recent experience spending $10 million hiring a contractor to update an open-source video calling application by building a beta version. This estimate does not include ongoing maintenance or updates, which the Commission originally included in a $32 million, five-year agreement. Developing and maintaining compliance for just one type of endpoint would cost from $1.9 million to more than $4 million. And these are just the quantifiable costs to one provider. They do not include the costs to other industry members. The Bureau should bear in mind that these costs would paid by ratepayers in the form of an exogenous-cost adjustment.[21]

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specifically for Deaf communication, we have pushed the limits of imagination to bring you a videophone (VP) that offers dazzling design, remarkable clarity and brilliant technology.").

[20] *See* Letter from Gabrielle Joseph, ASL Services Holdings, LLC and representatives of Convo, CSDVRS, Purple, and Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51 & 03-123, at 3 (filed Nov. 8, 2016).

[21] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, FCC 07-186, 22 FCC Rcd. 20,140, 20,168 ¶ 72 (2007) ("*2007 Declaratory Ruling*") ("Annually, VRS providers will be allowed to request exogenous treatment for costs they incurred during the three-year period that are the result of new regulations or otherwise beyond their control."),

The truly staggering costs, though, are the costs to VRS consumers in the form of the improvements that are never developed because providers no longer have the incentive to do so.

The Commission should perform a cost-benefit analysis before it adopts any additional requirements on providers, especially requirements as substantial as these. Indeed, the Commission should perform that cost-benefit analysis *after* implementation of the VRS Provider Interoperability Profile and the xCard standard for contacts. Then, the Commission will have far better knowledge of what, if any, interoperability or portability problems persist in the market for VRS services.

III. REQUIRING PROVIDERS TO USE THE RUE PROFILE FOR ALL ENDPOINTS WOULD VIOLATE THE ADA AND OTHER LAWS

Not only would mandatory implementation of the RUE Profile be bad policy, but it would also be inconsistent with the Americans with Disabilities Act ("ADA"), the Communications Act, and federal policy regarding the use of industry standards. It also exceeds the Bureau's delegated authority.

A. Mandating Use of the RUE Profile Would Violate Section 225 and Section 7

The *Further Notice* asks about the extent to which "applying the RUE Profile to provider-distributed VRS user equipment and software" would be "necessary and appropriate for functionally equivalent communication."[22] The answer is not at all. Rather, implementing the RUE Profile in provider endpoints would represent a step backward in the effort to ensure that Americans with hearing and speech disabilities can "engage in communication . . . in a manner

remanded in part sub nom. Sorenson Commc'ns, Inc. v. FCC, 567 F.3d 1215 (10th Cir. 2009); *Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37, 50 (D.C. Cir. 2014) (vacating increased VRS speed-of-answer rule because "[b]y adopting the new speed-of-answer metric without evidence of the cost to comply with it, the Commission acted arbitrarily and capriciously").

[22] *Further Notice*, 32 FCC Rcd. at 694 ¶ 23.

that is functionally equivalent to the ability of a hearing individual who does not have a speech disability to communicate using voice communication services."[23]

Compliance with the RUE Profile would be inconsistent with functional equivalence. As explained above, the RUE Profile is in draft form and lacks basic security features.[24] Hearing consumers are not required to use devices and applications that are in beta. It is not functionally equivalent to require hard-of-hearing users to do so.

Nor is it functionally equivalent to discourage innovation. As explained above, mandatory use of the RUE Profile would discourage development of new features for provider-distributed endpoints. Today seventy-seven percent of Americans own a smartphone, with its dizzying array of features and customizable options.[25] So far this year, at least twelve new models of smartphones have been released or revealed by major manufacturers.[26] In the face of

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[23] 47 U.S.C. § 225(a)(3).

[24] *See supra* p. 6.

[25] *See* Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, FACT TANK (Jan. 12, 2017), http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/.

[26] *See* News Release, AT&T, AT&T to Exclusive Offer the Stylishly Resilient LG X venture™ (May 22, 2017), http://www.lg.com/us/PDF/press-release/LG%20X%20venture%20Press%20Release%205.22.17%20-%20FINAL.pdf; Press Release, Samsung, Discover New Possibilities with the Samsung Galaxy S8 and S8+: A Smartphone Without Limits (Mar. 29, 2017), https://news.samsung.com/us/discover-new-possibilities-samsung-galaxy-s8-galaxy-s8-plus-unpacked-2017/; *Meet the New Moto E[4] & Moto E[4] Plus: Get More of a Good Thing*, MOTOROLABLOG (June 12, 2017), http://blog.motorola.com/2017/06/12/meet-new-moto-e%E2%81%B4-moto-e%E2%81%B4-plus-get-good-thing/; *Say Hello to New Possibilities with Moto Z[2] Play and Moto Mods*, MOTOROLABLOG (June 1, 2017), http://blog.motorola.com/2017/06/01/say-hello-new-possibilities-moto-z%C2%B2-play-moto-mods/; *Get the Trusted Essentials You Crave with the New Moto C & Moto C Plus*, MOTOROLABLOG (May 15, 2017), http://blog.motorola.com/2017/05/15/get-trusted-essentials-crave-new-moto-c-moto-c-plus/; *Premium For All: Meet the New Moto G5 and Moto G5 Plus*, MOTOROLABLOG (Feb. 26, 2017), http://blog.motorola.com/2017/02/26/premium-meet-new-moto-g%E2%81%B5-moto-g%E2%81%B5-plus/; Press Release, TCL Communication, The BlackBerry® KEYone Will Be Available Beginning May 31 in the U.S. from Amazon

this speed of innovation and feature development, it cannot be functionally equivalent to adopt requirements that discourage VRS Providers from developing and deploying new features in their endpoints.

To the contrary, the ADA requires that the Commission *encourage* the development of new features. Section 225(d)(2) mandates that "[t]he Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology."[27] Requiring the use of the RUE Profile in provider endpoints is directly counter to this mandate; it would both "discourage" and "impair" the development of improved equipment and software. Indeed, Chairman Pai has just announced that the Commission is going to "breathe life" into Section 7 of the Communications Act (referenced as Section 157(a) within Section 225), which sets time limits on the Commission's consideration of applications or petitions to offer new services or technologies (when Commission approval is required).[28] Section 7 states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public."[29] There is no exception for members of the public with disabilities. Rather, Congress's explicit reference to this policy in Section 225 underscores

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and Best Buy (May 30, 2017), http://www.prnewswire.com/news-releases/the-blackberry-keyone-will-be-available-beginning-may-31-in-the-us-from-amazon-and-best-buy-300465843.html; Press Release, HTC, HTC Unveils New Flagship Smartphone Made for the Brilliant U: Meet the HTC U11 (May 16, 2017), http://www.htc.com/us/about/newsroom/2017/2017-05-16-htc-u11-announcement/.

[27] 47 U.S.C. § 225(d)(2).

[28] *Benefits of the Digital Age* at 7.

[29] 47 U.S.C. § 157(a).

the critical importance of innovation to improve the lives of deaf, hard-of-hearing, and speech-disabled individuals.

Finally, implementing the RUE Profile for even a subset of provider endpoints violates the requirement that TRS be provided "in the most efficient manner" as required by Section 225(b)(1).[30] As explained above, it would cost the consumers who contribute to the TRS Fund more than $18 million to compensate just Sorenson for its costs to implementing the RUE Profile it its endpoints, with more over time. This expense is unnecessary and even counterproductive, not "efficient" as the statute requires.

B. The RUE Profile Is Not a Voluntary Industry Standard That Can Be Incorporated by Reference in the Rules

As Sorenson explained in its Petition for Reconsideration, the Bureau exceeded its delegated authority by incorporating the RUE Profile by reference into the Commission's rules; the Bureau's delegated authority extended to standards adopted by "voluntary, consensus standard organization[s]."[31] As explained in detail in the Petition, the RUE Profile was not adopted by a voluntary, consensus standard organization. It was created by Commission representatives, who dominated the group. There was no process for resolving disagreement and no consensus.[32] It exceeded the Bureau's delegated authority to adopt standards "developed

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[30] 47 U.S.C. § 225(b)(1).

[31] Petition for Reconsideration at 6 (quoting *Structure and Practices of the Video Relay Service Program*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-82, 28 FCC Rcd. 8618, 8643 ¶ 49 ("*VRS Reform Order*")). Sorenson incorporates by reference the arguments made in its attached Petition for Reconsideration regarding the Bureau's authority to incorporate the RUE Profile into the Commission's rules, which apply equally whether the RUE Profile is for use with the ACE App or for use with all VRS Provider-distributed endpoints.

[32] *See* Petition for Reconsideration at 6-10.

under the auspices of the SIP Forum, now or in future, or such other voluntary, consensus standard organization as may be formed to address these issues."[33] It was not validly incorporated for purposes of communications involving the ACE App, and it cannot be incorporated as it stands to govern communications with provider endpoints.

Equally important, during the development of the RUE Profile, the Commission representatives repeatedly communicated that the profile was being developed only as requirements for the ACE App, either intentionally misinforming the provider's engineering teams or themselves not understanding the Commission's ultimate goals.

In addition, the RUE Profile does not meet the requirements for incorporation by reference into the Commission's rules, whether by the Bureau or the full Commission. If anything, the RUE Profile is a "government-unique standard" that was created "by and for use by the Federal government in its regulations" and will not be "generally used by the private sector unless required by regulation."[34]

Though federal policy strongly favors voluntary consensus standards, agencies may use government-unique standards under limited circumstances, including "cases where no suitable voluntary consensus standards exist."[35] Doing so, however, comes with mandatory procedural and reporting requirements. Among other things, agencies that propose to use a government-unique standard must invite commenters to suggest non-government-unique alternatives in any

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[33] *VRS Reform Order*, 28 FCC Rcd. at 8643 ¶ 49.

[34] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES, 2016 WL 7664625, *14 (rev. 2016) ("OMB Circular A-119").

[35] *Id.* at *18.

rulemaking notice.[36] If they still decide to proceed with the government-unique option, agencies must "include a statement to that effect in the preamble of the final rule or guidance document."[37] Additionally, agency-created standards generally cannot be incorporated by reference into the Code of Federal Regulations. Only "unique" and "highly unusual" agency-produced material can only be incorporated by reference into an agency's rules.[38]

The RUE Profile was created "by and for" the Commission.[39] But for the regulatory requirement to do so, no VRS providers would have any reason to adopt the RUE Profile. It will never be "generally used by the private sector unless required by regulation."[40] Nonetheless, in the proceeding below, the Bureau did not comply with the procedure requiring agencies to provide notice of its intended use of government-unique standards—it has not even identified the RUE Profile as a government-unique standard. The RUE Profile, which is presented as a text document like hundreds of other Commission rules, has no "unique" or "highly unusual features" that would prevent it from being included directly in the Commission's rules.

If the Commission intends to require implementation of the RUE Profile, it must comply with requirements regarding government-unique standards or allow the RUE Profile to be properly developed by an actual voluntary industry standard organization.

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[36] *See id.* at *33.

[37] *Id.*

[38] Office of the Federal Register, *IBR Handbook* at 6 (Apr. 2016), https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf.

[39] OMB Circular A-119 at *14.

[40] *Id.*

IV. USE OF THE RUE PROFILE IMPLICATES SORENSON'S INTELLECTUAL PROPERTY RIGHTS

Sorenson has consistently and repeated disclosed to the Commission and its vendors that it owns intellectual property ("IP") embedded in the draft RUE Profile and implicated by its use in provider endpoints as well as the ACE App.[41]

In comments last fall, Sorenson identified its relevant patents and repeated the history of its prior disclosures of its IP rights to the Commission's contractor. Sorenson explained to the Bureau that "Sorenson has a deep portfolio of patents that may be implicated by the RUE profile. In a further effort to ensure full disclosure (and notwithstanding Sorenson's separately requested clarifications and arguments against implementation of the RUE profile), Sorenson has reviewed the RUE profile and concluded that either the ACE endpoint or the use of the ACE platform, as the RUE profile is currently drafted, may implicate one or more claims of at least Sorenson's United States Patent Nos. 7,142,643, 7,206,386, 7,016,479, 7,583,286, 7,746,985, and 9,185,211."[42]

Most recently, Sorenson re-explained that its IP is embedded in the RUE Profile and that the ACE App itself implicates Sorenson's IP.[43] If the Commission were to require the use of the RUE Profile in VRS provider-distributed endpoints, Sorenson's IP rights would be implicated.

The Commission has implicitly recognized the value of intellectual property in the provision of TRS. Licensing costs appear to be accepted as allowable costs of providing IP CTS,

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[41] *See* Petition for Reconsideration at 18-20; Separate Comments of Sorenson Communications, Inc. in Response to Further Notice of Proposed Rulemaking at 2-4, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) ("Sorenson September 2016 Comments") (detailing prior disclosures and repeating disclosure of specific patents).

[42] Sorenson September 2016 Comments at 3-4.

[43] *See* Petition for Reconsideration at 18-20.

and there is no principled basis to distinguish intellectual property costs for IP CTS from intellectual property costs for VRS.[44] The Commission should likewise recognize that when it and its vendors use the intellectual property of private parties, they owe appropriate compensation for use of that property.

Sorenson therefore repeats its offer to discuss reasonable and appropriate licensing terms of any of its IP affected by development or lawful use of the RUE Profile.

V. REQUIRING PROVIDER-SUPPLIED ENDPOINTS TO CONFORM TO THE RUE PROFILE WITHOUT JUST COMPENSATION WOULD BE AN UNCONSTITUTIONAL TAKING

As Sorenson explained to the Commission last fall, the Commission cannot direct VRS Providers to use the RUE Profile in their distributed endpoints without violating the Takings Clause of the Constitution.[45] For Sorenson's endpoints to comply with the RUE profile, Sorenson would have to build features, per government specifications, onto the endpoints that it loans or licenses to VRS users. When combined with the ban on conditioning the loan of its equipment or the licensing of its software endpoints to VRS users on the selection of Sorenson as their default provider,[46] requiring RUE Profile compliance on all VRS Provider-distributed endpoints constitutes a permanent, physical occupation of Sorenson's property.

The Commission lacks the authority to order Sorenson to allow a permanent physical occupation on its private property. The Takings Clause of the Constitution prohibits the

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[44] *See, e.g.*, Letter from John T. Nakahata, Counsel to Sorenson Communications, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51, at 4 (filed May 4, 2017).

[45] *See* Sorenson September 2016 Comments at 4-8.

[46] *See 2007 Declaratory Ruling*, 22 FCC Rcd. at 20,175 ¶ 94.

government from taking "private property . . . for public use, without just compensation."[47] Because the power of the purse rests with Congress, agencies may not enact regulations that will necessarily result in a taking that constitutes a "permanent physical occupation," absent clear authorization from Congress to engage in a taking.[48] If a regulation creates "an identifiable class" of applications that would necessarily result in the permanent physical occupation of private property in furtherance of a public purpose, it is invalid unless (1) "any fair reading" of the statutory basis for the regulation gives the Commission the authority to engage in a physical taking, or (2) Congress implicitly gave the Commission the authority to engage in a physical taking because "the grant [of authority] itself would be defeated unless [takings power] were implied."[49] This rule applies equally to personal (as opposed to real) property.[50]

Because the Commission lacks Congressional approval and would not provide just compensation for allowing a permanent physical occupation of Sorenson endpoints, it cannot mandate compliance with the RUE Profile for all provider-distributed endpoints.

Sorenson incorporates by reference its arguments regarding the Takings Clause from its comments of September 2016 in this docket, which are also attached to this filing.

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[47] U.S. CONST. amend. V.

[48] *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)); *see also Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (explaining that, with a permanent physical occupation, a taking occurs "no matter how minute the intrusion, and no matter how weighty the public purpose behind it").

[49] *Bell Atl.*, 24 F.3d at 1445-46 (quoting *W. Union Tel. Co. v. Pa. R.R. Co.*, 120 F. 362, 373 (C.C.W.D. Pa. 1903)).

[50] *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

VI. CONCLUSION

The Commission should not require implementation of the RUE Profile in provider-distributed endpoints. Mandating use of the RUE Profile would harm consumers by depriving them of the full benefits of innovation and offering them a less secure service, all at a cost of tens of millions of dollars. It would also violate federal statutes and the Constitution. The Commission should abandon the RUE Profile project. At a minimum, the Commission should withhold judgment on the need for the RUE Profile until VRS Providers have completed implementation of the VRS Provider Interoperability Profile and xCard standard and MITRE has completed development of the National Testing Lab, which will serve as an ongoing neutral forum for identifying and correcting real-life issues as they arise.

Respectfully submitted,

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June 12, 2017

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of:	
Structure and Practices of the Video Relay Service Program	CG Docket No. 10-51
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	CG Docket No. 03-123

SORENSON COMMUNICATIONS, LLC, PETITION FOR PARTIAL RECONSIDERATION, OR IN THE ALTERNATIVE, SUSPENSION OF THE RUE IMPLEMENTATION DEADLINE

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May 30, 2017

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I. INTRODUCTION AND SUMMARY

Pursuant to section 405 of the Communications Act of 1934, as amended, and section 1.429 of the Commission's rules, Sorenson Communications, LLC ("Sorenson") hereby seeks partial reconsideration of the order adopted by the Consumer and Governmental Affairs Bureau ("Bureau") on January 17, 2017.[1] Sorenson supports the Bureau's adoption of the VRS Provider Interoperability Profile and its decision to seek further comment on whether to require all VRS providers to use the draft Relay User Equipment or "RUE" Profile in all equipment and software that they distribute or loan to their customers. Sorenson remains concerned, however, with use of the draft RUE Profile for communications involving the Accessible Communication for Everyone or "ACE" App. Notwithstanding that the RUE Profile is in draft form[2] and that the ACE App has serious known problems, such as not enabling the user to update his or her Registered Location for 911 purposes, the Bureau incorporated the draft RUE Profile into the Commission's rules and established a one-year deadline for VRS providers to implement the draft RUE Profile for purposes of communications using the ACE App.

Known problems with the draft RUE Profile and ACE App should be addressed *before* the implementation clock starts to tick. In fact, as Sorenson suggested prior to the Bureau's order, the stumbling blocks with the RUE Profile and ACE App present an opportunity to take a

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[1] *Structure and Practices of the Video Relay Service Program*; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 687 (Consumer & Gov'tl Affs. Bur. rel. Jan. 17, 2017) ("*CGB January Order*," "*CGB January Further Notice*," or "*Report and Order*"). The *CGB January Order* appeared in the Federal Register on April 27, 2017; as such, this petition for partial reconsideration is timely filed under 47 C.F.R. § 1.429(d).

[2] Indeed, the draft expired in January. *See* Internet Engineering Task Force, Interoperability Profile for Relay User Equipment (P. Kyzivat & H. Schulzrinne, eds., July 20, 2016), https://tools.ietf.org/pdf/draft-vrs-rue-dispatch-00.pdf ("RUE Profile").

fresh look at the endeavor to create an ACE App. Since the ACE App was first envisioned in 2013 as a tool for improving interoperability among VRS providers, the industry has greatly improved interoperability through collaborative efforts and engineering-focused conferences and calls. Furthermore, the Bureau has adopted the VRS Provider Interoperability Profile for all providers as well as the xCard standard to facilitate the portability of contact lists and speed dial entries. To the extent that interoperability issues persist, the implementation of the VRS Provider Interoperability Profile and the xCard standard will address the key concerns that consumer groups have articulated. On top of these improvements, a national provider-to-provider testing laboratory is underway. A cost-benefit analysis, had one been conducted, would have shown that the incremental benefits—if any—of the ACE App project fail to justify the multiple millions of dollars in provider and Commission costs to continue. In addition, the Bureau lacked delegated authority to incorporate the RUE Profile into the Commission's rules. For these reasons, Sorenson respectfully requests that the Commission or Bureau reconsider the decision to mandate implementation of the RUE Profile and ACE App.

In the alternative, if the agency believes upon further review that the benefits of the ACE App outweigh its costs and thus proceeds with the ACE App project and a RUE Profile mandate, the deadline for provider implementation should be suspended until the known and serious problems with the draft RUE Profile and ACE App are resolved and a fully compliant version of the ACE App is available for testing. The Commission also needs to address the fact that the RUE Profile (and therefore the ACE App) rely on Sorenson patents and require appropriate licensing arrangements before they can be used by other providers, developers, the Commission, or the general public.

II. THE COSTS OF IMPLEMENTING THE RUE PROFILE FOR THE ACE APP FAR OUTWEIGH ANY BENEFITS

As it did last fall on the record of this proceeding,[3] Sorenson encourages the Commission to step back and consider the ACE App endeavor, particularly whether the continuing and substantial costs of the ACE App project are "truly justified"[4] by the purported benefits. The hoped-for benefit of the ACE App, back in 2013, was to improve interoperability by creating a "reference platform" against which providers could test their own VRS access technology to ensure that it is fully compliant with interoperability requirements.[5] But the utility of such a "reference platform" has been greatly diminished because the industry has since developed and adopted a standard to govern interoperability (which the Commission has incorporated into its rules), and MITRE is building a national provider-to-provider interoperability testing laboratory, which will provide even greater transparency in identifying and addressing any interoperability issues. In addition, the issues about which the consumer groups have expressed the greatest concern—portability of personal contacts lists and speed dial settings—are addressed by the xCard standard, which has been adopted for implementation by October 24, 2017.[6] Given the

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[3] *See* Letter from Gabrielle Joseph, ASL Services Holdings, LLC and representatives of Convo, CSDVRS, Purple, and Sorenson, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51 & 03-123, at 4 (filed Nov. 8, 2016) ("Joint Provider Letter") (suggesting that the Commission "assess whether the ACE endpoint is still needed to provide an interoperability benchmark or whether interoperability has been adequately addressed through other means").

[4] Press Release, FCC, Statement of Commissioner Michael O'Rielly on Commission's Formation of an Office of Economics and Data (Apr. 5, 2017).

[5] *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8618, 8644 ¶ 53 (2013) ("*VRS Reform Order*"), *vacated in part on other grounds sub nom. Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37 (D.C. Cir. 2014).

[6] *CGB January Order*, 32 FCC Rcd. at 693 ¶ 16.

very positive developments since the *VRS Reform Order* in 2013, the utility of the ACE App is doubtful at best. Certainly, there has been no "meaningful attempt to determine the net benefits" of the ACE App.[7]

Yet the implementation of the RUE Profile for the ACE App imposes significant costs on VRS providers as well as the Commission. The Bureau failed to address record evidence regarding the costs to providers of implementing the RUE Profile to support the ACE App. The Joint Providers estimated that implementation of the RUE Profile *limited to support of the ACE App* will cost each provider multiple millions of dollars.[8] Indeed, as explained below, the RUE Profile and ACE App require modifications if they are to be used responsibly by the public, and that process will create additional costs to the Commission as well as to the providers. The Commission should take this opportunity to "grapple in a serious way with the costs that [the prior Commission's] regulatory wish-list will impose."[9] It should perform a cost-benefit analysis for the ACE App project before imposing implementation costs of this magnitude on the industry for no identified relevant benefit. Sorenson believes that the costs are not justified and for that reason the requirement to facilitate communications with the ACE App should be reconsidered.

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[7] Ajit Pai, Chairman, FCC, Remarks at the Hudson Institute: The Importance of Economic Analysis at the FCC, at 3 (Apr. 5, 2017); *see also* Michael O'Rielly, Commissioner, FCC, Remarks before the Prosperity Caucus, at 2 (Sept. 21, 2015) (calling for the Commission to identify a market failure before acting, carefully tailor its solution, and ensure that the benefit of regulation outweighs the burdens).

[8] *See* Joint Provider Letter at 3.

[9] *Improving Outage Reporting for Submarine Cables and Enhanced Submarine Cable Outage Data*, Report and Order, 31 FCC Rcd. 7947, 7996 (Dissenting Statement of Commissioner Ajit Pai) (2016); *see also id*. at 8003 (noting that federal agencies are obligated by the Administrative Procedure Act and principles of good government to "ensure in advance that its decisions will be beneficial on net to the American public").

III. THE RUE PROFILE WAS NOT VALIDLY INCORPORATED INTO THE RULES FOR ANY PURPOSE

Regardless of any merits of the ACE App endeavor, the RUE Profile is not enforceable in its current form. In August 2016, the Bureau proposed to incorporate the RUE Profile by reference into the Commission's rules. The Bureau's proposal would have required VRS providers to implement the RUE Profile for all endpoints, including their own distributed endpoints as well as ACE App endpoints. In response to this tentative conclusion, the Providers pointed out the flaws in this proposal, including the Bureau's lack of delegated authority to incorporate the RUE Profile in the Commission's rules. The Bureau did not address the bulk of the Providers' comments, and its decision to apply the draft RUE Profile only to communications with ACE App endpoints pending resolution of the *CGB January Further Notice* fails to cure the legal infirmities.

A. The Bureau's Delegated Authority Extended Only to Voluntary, Consensus Standards

The Joint Providers explained in their comments that the Bureau lacked authority to adopt the RUE Profile as it did. In the *VRS Reform Order*, the Commission delegated to the Bureau the authority to conduct rulemakings to adopt "interoperability and portability standards developed under the auspices of the SIP Forum, now or in future, or such other *voluntary, consensus standard organization* as may be formed to address these issues."[10] The full Commission also required that FCC staff participation in the development comport with Office of Management and Budget ("OMB") requirements regarding standards set by such

[10] *VRS Reform Order*, 28 FCC Rcd. at 8643 ¶ 49 (emphasis added). Absent an express delegation to the Bureau, a rulemaking must be initiated by the full Commission. *See* 47 C.F.R. § 0.361(a) (providing that a notice of proposed rulemaking "shall be referred to the Commission en banc for disposition").

organizations.[11] As explained in detail by the Joint Providers,[12] by ZVRS,[13] and by GlobalVRS,[14] the "group" that produced the current RUE Profile was not a "voluntary, consensus standard organization,"[15] and FCC staff participants did not follow Commission instructions to limit their participation in accordance with OMB requirements.

The RUE Profile was born out of a series of informal conference calls hosted by Commission contractor VTCSecure, who was later replaced, and ultimately dominated by Commission representatives. The resulting document cannot be called a "voluntary consensus standard" because the process that developed the RUE Profile did not include several of the

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[11] *VRS Reform Order*, 28 FCC Rcd. at 8642 ¶ 48 n.129.

[12] *See* Comments of Convo Communications, CSDVRS, Purple Communications, and Sorenson Communications at 3, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) ("Joint Provider Comments") (explaining in detail how FCC staff and contractors controlled the draft RUE Profile and the input process).

[13] *See* Comments of ZVRS on the VRS Interoperability FNPRM at 4, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) ("ZVRS Comments") ("[T]he drafting process for the RUE Profile involved an informal solicitation of feedback by the ACE software developer, FCC staff, and eventually the MITRE Corporation, and not a formalized process involving a 'voluntary, consensus standard organization' in which all VRS providers were afforded a meaningful opportunity to make contributions and raise objections.").

[14] *See* Comments of ASL Services Holdings, LLC dba GlobalVRS in Response to Further Notice of Proposed Rulemaking at 5-6, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) ("GlobalVRS Comments") (explaining in detail how RUE Profile development "marginally involved the providers" who had "limited opportunity to make generalized recommendations" and "no control over – or direct technical development involvement in – the RUE Profile").

[15] Though the Bureau acknowledges that four VRS providers argued that the RUE Profile was not developed by a voluntary consensus standards organization, *CGB January Order*, 32 FCC Rcd. at 691 ¶ 10, it does not answer—or even address—those concerns. Nor does the Bureau find any facts that would contradict the VRS providers' version of events. That failure to "consider an important aspect of the problem" with the development and adoption of the RUE Profile also renders its incorporation into the Commission's rules arbitrary and capricious in violation of the Administrative Procedure Act. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

elements required by the Office of Management and Budget and federal statute: openness, balance, due process, appeals process, and consensus.[16]

First, the proceedings lacked due process, which requires "documented and publically available policies and procedures, adequate notice of meetings and standards development, sufficient time to review drafts and prepare views and objections, access to views and objections of other participants, and a fair and impartial process for resolving conflicting views."[17] VTCSecure initially adopted a process for distributing drafts through a Google Doc that "might change drastically from day to day."[18] That moving target prevented VRS providers from offering meaningful edits.[19] An FCC representative later "took control of the document, substantially revised it, and distributed it as draft zero to the providers for comment and revisions in March 2016."[20] The new "draft zero" fundamentally changed the purpose of the document—without explanation or discussion among the parties—to impose much broader requirements than

[16] In the *VRS Reform* Order adopted in 2013, the Commission directed the Bureau to comply with OMB requirements applicable at the time. *See* OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 1998 WL 216930, at *1-3 (Feb. 10, 1998) (citing National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, § 12(d), 110 Stat. 775 (1996) (codified at scattered sections of 15 U.S.C.); *see* also 15 U.S.C. § 4301(a)(8), (10) (adopting the February 10, 1998 version of OMB Circular A-119 for the statutory definitions of "standards development organization" and "voluntary consensus standard"). OMB updated the Circular after the Commission adopted the *VRS Reform Order* in 2013. *See* OMB Circular A-119, 2016 WL 7664625, *14-15 (Jan. 27, 2016) ("OMB Circular A-119"). For key events in the development of the draft RUE Profile, the 2016 version of the Circular was in effect; regardless, both versions require openness, balance, due process, appeals process, and consensus.

[17] OMB Circular A-119 at *15.

[18] Joint Provider Comments at 3.

[19] *Id.*

[20] *Id.*

had been discussed over the proceeding months. When VRS providers objected to the change, there was no fair and impartial process for resolving the disagreement. The FCC's representatives simply "declined to change" the disputed language while assuring VRS providers that revisions would not create the new obligations to which they objected—statements that turned out to be false.[21]

Second, the process lacked "balance," which requires that "no single interest dominat[es] the decision-making."[22] The FCC's representatives maintained "close control" of the drafting process, maintaining "sole control" of the document at all times—unilaterally revising the document and deciding which feedback to accept or reject.[23] They also refused to seriously consider the views of participating VRS providers—even on issues as fundamental as the RUE Profile's applicability.[24] In doing so, the FCC did not participate "on an equal basis with other members" as federal policy requires, and instead impermissibly dominated the RUE Profile's development.[25]

Third, the draft RUE Profile does not reflect any consensus among the participants. Unanimity is not required, but "general agreement" is.[26] Joint VRS Providers' comments in this proceeding made their position clear: "The Commission should not adopt the RUE Profile."[27] Moreover, it is not clear that the RUE Profile has been "adopted" by *anyone* but the Bureau. The

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[21] *Id.* at 4.

[22] OMB Circular A-119 at *14.

[23] Joint Comments of VRS Providers at 6.

[24] *Id.* at 5.

[25] OMB Circular A-119 at *27.

[26] *Id.* at *15.

[27] Joint Provider Comments at 4.

website where the Commission says the RUE Profile is "reasonably available" to the public makes clear that the document[28] is an expired draft that the guidelines of the Internet Engineering Steering Group, which maintains the IETF standards database, call a "tombstone file."[29]

The Commission's original delegation to the Bureau did nothing more than require the Bureau to comply with federal law. The National Technology Transfer and Advancement Act ("NTTAA") calls on all federal agencies "to use standards developed or adopted by voluntary consensus standards bodies rather than government-unique standards," with limited exceptions.[30] Congress requires federal agencies to use "voluntary consensus standards" whenever practical and consistent with law in order to reduce costs to the federal government and regulated industry, incentivize the creation of standards that drive economic growth, and leverage private-sector expertise in drafting regulations.[31] Because the RUE Profile was developed and adopted by Commission representatives for the Commission's purposes—and not by a standards body representing the consensus view of industry stakeholders—the RUE Profile is a disfavored "government-unique standard."

As it was not developed by a voluntary, consensus standard organization, the draft RUE Profile as it emerged was beyond the Bureau's delegated authority to adopt and incorporate into the Commission's rules for *any* purpose—whether for communications involving ACE App endpoints or other endpoints. The *CGB January Order* did not acknowledge or address the arguments below on precisely this point.

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[28] *See supra* note 2.

[29] Russ Housley, Internet Engineering Task Force, Guidelines to Authors of Internet-Drafts § 8 (Dec. 7, 2010), https://www.ietf.org/ietf-ftp/1id-guidelines.txt.

[30] OMB Circular A-119 at *12.

[31] *Id.* at *13.

B. As an FCC-Created "Standard," the RUE Profile Cannot Be Incorporated by Reference into the Commission's Rules

If it can be called a "standard" at all, the RUE Profile is a "government-unique standard" that was created "by and for use by the Federal government in its regulations" and will not be "generally used by the private sector unless required by regulation."[32] As such, the RUE Profile is agency-produced material that should not have been incorporated by reference into the Code of Federal Regulations.[33]

Though federal policy strongly favors voluntary consensus standards, agencies may use government-unique standards under limited circumstances, including "cases where no suitable voluntary consensus standards exist."[34] Doing so, however, comes with mandatory procedural and reporting requirements. Among other things, agencies that propose to use a government-unique standard must invite commenters to suggest non-government-unique alternatives in any rulemaking notice.[35] If they still decide to proceed with the government-unique option, agencies must "include a statement to that effect in the preamble of the final rule or guidance

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[32] *Id.* at *14.

[33] As discussed above, VRS providers' arguments about the Commission's domination of the RUE Profile's development were not addressed in the *Report and Order*. *See supra* note 15. This argument is appropriate for reconsideration because it relies on facts and events that occurred after the *Report and Order* was published. *See* 47 C.F.R. § 1.429(b)(1). On April 27, 2017, the *Report and Order* was published in the Federal Register, 82 Fed. Reg. 19,322. The Federal Register indicates that the Commission sought and received approval from the Director of the Federal Register to incorporate the RUE Profile by reference pursuant to 1 C.F.R. Part 51. To receive the approval, Commission presumably represented to the Office of the Federal Register that the RUE Profile was eligible for incorporation by reference—even though Bureau had never addressed the VRS providers' arguments and associated facts showing that Commission representatives impermissibly dominated the process of developing the RUE Profile.

[34] OMB Circular A-119 at *18.

[35] *See id.* at *33.

document."[36] The NTTAA also requires that agencies report any government-unique standards they use to the National Institute of Standards and Technology.[37]

Additionally, agency-created standards generally cannot be incorporated by reference into the Code of Federal Regulations. Only "unique" and "highly unusual" agency-produced material can only be incorporated by reference into an agency's rules.[38]

As the proceedings described above illustrate, the RUE Profile was created "by and for" the Commission for use in this regulation.[39] But for the regulatory requirement to use the ACE App, no VRS providers would have any reason to adopt the RUE Profile. It will never be "generally used by the private sector unless required by regulation."[40] Nonetheless, the Bureau has failed to comply with the procedure requiring agencies to provide notice of its intended use of government-unique standards—it has not even identified the RUE Profile as a government-unique standard. The RUE Profile, which is presented as a text document like hundreds of other FCC rules, has no "unique" or "highly unusual features" that would prevent it from being included directly in the Commission's rules.

At its core, the RUE Profile is nothing more than an "agency pronouncement[] with general legal effect" that "should be uniformly codified" in the Code of Federal Regulations after an appropriate rulemaking process just like any other technical rule developed by the

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[36] *Id.*

[37] *See id.* at *18.

[38] Office of the Fed. Register, IBR Handbook at 6 (Apr. 2016), https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf.

[39] OMB Circular A-119 at *14.

[40] *Id.*

Commission would be.[41] In failing to acknowledge its own central role in the RUE Profile's development and adoption, the Bureau has circumvented protections designed to facilitate compliance with the NTTAA and a complete and accurate Code of Federal Regulations. The RUE Profile's incorporation into the FCC's rules therefore violates federal law and longstanding federal policy.[42] It must be reconsidered.

IV. PROVIDER IMPLEMENTATION OF THE RUE PROFILE SHOULD BE SUSPENDED WHILE OUTSTANDING PROBLEMS ARE ADDRESSED

In the *CGB January Order*, the Bureau incorporated the RUE Profile by reference into the Commission's existing rule on interoperability for purposes of interactions between VRS providers and the ACE App and set a twelve-month implementation deadline that began to run with Federal Register publication.[43] Under the new requirement, providers must use the RUE Profile to facilitate communications with endpoints using the ACE App, ensuring that their back-end systems correctly and consistently handle these communications.

In their comments filed more than seven months ago, VRS providers explained that they need one year to implement this interoperability, starting *after* the ACE App is finalized and available for testing.[44] In its order, the Bureau stated, "[a]s we expect that the ACE App will be

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[41] Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol'y 131, 142 (2013).

[42] The Bureau's action is therefore "not in accordance with law" and "without observance of procedure required by law" under the requirements of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (D).

[43] *See* 47 C.F.R. § 64.621; *CGB January Order*, 32 FCC Rcd. at 691-92 ¶¶ 11, 14. The *CGB January Order* appeared in the Federal Register on April 27, 2017, thus setting a compliance deadline of April 27, 2018. Structure and Practices of the Video Relay Services Program, 82 Fed. Reg. 19,322 (Apr. 27, 2017).

[44] *See* Joint Provider Comments at 2; ZVRS Comments at 2 (urging the Commission to clarify that compliance with the RUE Profile for interactions with the ACE Application "will not be required until at least 12 months after completion of the ACE software"); *see also* GlobalVRS

released in the near future in a version suitable for interoperability testing, we conclude that it is reasonable to allow one year for VRS providers to complete software development, testing, and deployment to ensure that their networks are interoperable with the ACE App."[45] Just last week an updated version of the Windows-based version of the ACE App was made available, which still has bugs, does not include application (client) certificates, has not completed a full regression test, and lacks basic 911 address features that were required by the *VRS Reform Order*.[46] The Bureau provided one year for VRS providers to come into compliance, measured from Federal Register publication of the *CGB January Order*. The Bureau's deadline ignores record evidence regarding the state of the RUE Profile, provides too little time for testing with a certified-compliant app, and potentially jeopardizes the safety of ACE App users and the security of VRS providers' networks.

A. The Draft RUE Profile Is Incomplete

The Bureau did not acknowledge, much less address, the incomplete status of the draft RUE Profile itself. The draft RUE Profile sets the parameters for the ACE App, and a working RUE Profile is a necessary precondition to developing a RUE Profile-compliant ACE App. As the Joint Providers explained in November 2016, "the security provisions of the RUE Profile, and critical operational detail with respect to security, maintenance, support, and centralized

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Comments at 7 ("It is impossible to establish a provider compliance timeline in the absence of completed ACE applications for testing.").

[45] *CGB January Order*, 32 FCC Rcd. at 692 ¶ 14.

[46] *VRS Reform* Order, 28 FCC Rcd. at 8645-46 ¶ 56 ("The VRS access technology reference platform will be fully functioning VRS access technology; that is, it will function as current provider-specific products function to provide the ability to place VRS and point-to-point calls, including dial-around functionality, ***the ability to update the users registered location***, and such other capabilities as are required by our rules.") (emphasis added).

services, have not yet been defined."[47] Notwithstanding that security provisions such as a client certificate, the ability for users to update Registered Locations for 911 purposes, and other critical gaps in the RUE Profile remained unaddressed at the time the Bureau adopted the *CGB January Order* (and remain so more than four months later), the Bureau nonetheless required VRS providers to implement the (incomplete) RUE Profile to facilitate communications with the (half-complete) ACE App within one year.

B. The ACE App Is Not Completed

Even if the RUE Profile were complete, the Bureau's deadline is unreasonable and arbitrary because the ACE App is not done. The providers explained below that they need "more than a year of intensive work from their engineering departments *after there is a working ACE*."[48] While Bureau apparently hoped that "the ACE App will be released in the near future in a version suitable for interoperability testing,"[49] that did not materialize. More than four months later, an updated version of the ACE App has only just been released for preliminary, in-lab testing. In addition, as far as Sorenson is aware, there is no timeline for building necessary support functions if the ACE App is to work at all. For example, full use of the ACE App requires web-based repositories of information regarding each VRS Provider to assist with establishing communication between the ACE App user and the VRS Provider's network. These

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[47] Joint Provider Letter at 3.

[48] *Id.* (emphasis added) ("Only after ACE application and its centralized servers have been tested can providers then move forward with implementing and testing of their back-end changes that would be necessary to support and interoperate with the ACE application in a production environment."); Joint Provider Comments at 2 ("Accordingly, the Providers respectfully request that the Bureau allow them 12 months following the availability of a certified profile-compliant version of the ACE application to ensure that their networks are compliant with the RUE Profile.").

[49] *CGB January Order*, 32 FCC Rcd. at 692 ¶ 14.

repositories do not exist nor does there appear to be any action toward creating and maintaining them.

Moreover, implementing the RUE Profile for communications with the current version of the ACE App would be a step backwards in the quest for ever better options for consumers. For example, the current version of the ACE App does not support the ability for VRS users to update the user's Registered Location—a feature that is required by the Commission's rules[50] and that the *VRS Reform Order* specifically required the ACE App to support.[51] This is a dangerous omission. As the ACE App currently stands, a user could download the app to a Windows device[52]—such as a laptop—and provide an initial Registered Location for purposes of identifying the user's location in case he or she places a 911 call. The ACE App, however, provides no in-app mechanism for the user to update that location. As a result, the originally entered location will be used to route the user's 911 call to the appropriate PSAP and to identify his or her location for purposes of providing emergency assistance, regardless how many times the user has since changed locations, unless the user takes affirmative steps to notify the VRS Provider by calling customer service each time he or she changes location. (Of course, the user would have to call during normal customer service hours and would be unable to update the

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[50] *See* 47 C.F.R. § 64.605(b)(4)(ii) ("If the VRS or IP Relay is capable of being used from more than one location, provide their registered Internet-based TRS users one or more methods of updating their Registered Location, including at least one option that requires use only of the iTRS access technology necessary to access the VRS or IP Relay. Any method utilized must allow a registered Internet-based TRS user to update the Registered Location at will and in a timely manner.").

[51] *See VRS Reform* Order, 28 FCC Rcd. at 8645-46 ¶ 56.

[52] Providers understood that the Bureau originally planned for versions of the ACE App for four different operating systems (Android, Apple, iOS, and Windows). However, Sorenson understands that the current vendor has been told not to develop or maintain any versions but the Windows version.

Registered Location during nighttime or some weekend periods.) This alarming gap in the ACE App jeopardizes the safety of the very users the App is intended to benefit.

Furthermore, Sorenson understands that the ACE App provides no method for the VRS Provider to verify the authenticity of the ACE App. Applications can be verified through the use of a client certificate, which authenticate the application. In this case, a client certificate would authenticate the version of the ACE App as one that has been tested (presumably by MITRE) and not tampered with. Once the ACE App is released, the absence of a client certificate means that anyone could modify the App to include malware. This poses a security threat to VRS providers' networks, which contain consumers' personal information, are subject to privacy requirements to ensure the confidentiality of consumer information, and facilitate emergency communications. Sorenson has not yet determined how it will ensure that calls coming in via the ACE App do not pose security risks to its network. The draft RUE Profile specifies that a client certificate is optional and that providers may reject calls coming into their networks from versions of the ACE App that lack a client certificate.[53] But rejecting calls is no way to facilitate interoperability testing and consumer choice. The ACE App and draft RUE Profile simply are not ready.

C. Interoperability Testing Does Not Require RUE Profile Implementation

At this point, the Commission's intentions for the ACE App are unclear. It is not being developed for platforms other than Windows, and it lacks security and 911 features. It is in no shape for distribution to the public. If the Commission's intent is to use the App to test interoperability among providers, that can be done without requiring the providers to implement

[53] *See* RUE Profile § 5.

the RUE Profile. The Bureau should suspend the requirement to implement the RUE Profile unless and until it clarifies that a fully functional ACE App will be made available to the public.

Interoperability testing with the ACE App can proceed without any implementation of the RUE Profile in VRS Providers' backend systems. MITRE has already shown that it can register the ACE App with its own SIP service (ACE Connect Lite), and then use the ACE App to test point-to-point and dial-around interoperability between the ACE App and any provider's endpoints or dial-around service. From this isolated environment the Commission's contractor can place and receive calls of every type required to verify minimum required feature interoperability. Unless and until the Commission invests sufficiently in the ACE App to modify it for general public use, there is no need for providers to implement the RUE Profile.

D. Any Implementation Deadline Should Be Suspended

To the extent that the Bureau presses forward with the RUE Profile and ACE App, the implementation deadlines should be suspended until after the RUE Profile is corrected and the certified-compliant version or versions of the ACE App are released for testing. At that time, providers should have no less than one year for implementation and testing. Efforts to implement unfinished versions of the ACE App will do nothing but increase providers' costs and divert resources from other, more worthwhile efforts that will actually improve the experience for customers.

V. USE OF THE RUE PROFILE AND ACE APP REQUIRE LICENSING FROM SORENSON

Sorenson has consistently pointed out to the Bureau and its vendors that it owns intellectual property ("IP") embedded in the draft RUE Profile and implicated by its use in the

ACE App.[54] The Bureau was well-aware that any use of the RUE Profile—whether as required solely for communication with the ACE App or for communication with all VRS-distributed endpoints—implicates Sorenson's IP rights, and that Sorenson stands ready to discuss appropriate licensing arrangements. The Bureau nonetheless put the Commission in the position of violating those IP rights without even acknowledging that they exist.

In its separate comments in response to the Bureau's Further Notice, Sorenson identified its relevant patents and repeated the history of its prior disclosures of its IP rights to the Commission's vendor. Sorenson explained to the Bureau that "Sorenson has a deep portfolio of patents that may be implicated by the RUE Profile. In a further effort to ensure full disclosure (and notwithstanding Sorenson's separately requested clarifications and arguments against implementation of the RUE profile), Sorenson has reviewed the RUE profile and concluded that either the ACE endpoint or the use of the ACE platform, as the RUE profile is currently drafted, may implicate one or more claims of at least Sorenson's United States Patent Nos. 7,142,643, 7,206,386, 7,016,479, 7,583,286, 7,746,985, and 9,185,211."[55]

The Commission has implicitly recognized the value of intellectual property in the provision of TRS. Licensing costs appear to be accepted as allowable costs of providing IP CTS, and there is no principled basis to distinguish intellectual costs for IP CTS from intellectual property costs for VRS.[56] The Commission should likewise recognize that when it and its

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[54] *See* Separate Comments of Sorenson Communications, Inc. in Response to Further Notice of Proposed Rulemaking, CG Docket Nos. 03-123 & 10-51 (filed Sept. 14, 2016) (detailing prior disclosures and repeating disclosure of specific patents).

[55] *Id.* at 3-4.

[56] *See, e.g.*, Letter from John T. Nakahata, Counsel to Sorenson Communication, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51, at 4 (filed May 4, 2017).

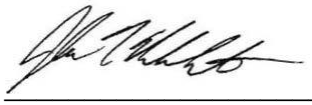
vendors use the intellectual property of private parties, they owe appropriate compensation for use of that property.

Sorenson therefore repeats its offer to discuss reasonable and appropriate licensing terms of any of its IP affected by development or use of the ACE App and RUE Profile. Barring appropriate arrangements, Sorenson will necessarily consider its other options.

VI. CONCLUSION

For the reasons stated in this Petition, Sorenson respectfully requests reconsideration of the requirement that VRS providers implement the RUE Profile for any purpose. At a minimum, the implementation deadline should be suspended, and VRS providers should have no less than a full year *after* the RUE Profile is corrected and the certified-compliant version or versions of the ACE App are released for testing before they must support communications with ACE App endpoints.

Respectfully submitted,



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May 30, 2017

Attachment B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of:	
Structure and Practices of the Video Relay Service Program	CG Docket No. 10-51
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	CG Docket No. 03-123

SEPARATE COMMENTS OF SORENSON COMMUNICATIONS, INC. IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

Sorenson Communications, Inc. ("Sorenson") supports many of the FCC efforts to improve interoperability in the video relay service ("VRS") marketplace. As Sorenson explains in joint comments that it is concurrently filing with several of its competitors, Sorenson supports the substance (but not the timing) of the Commission's proposal to incorporate by reference into its interoperability rules the US VRS Provider Interoperability Profile,[1] which the SIP Forum's Video Relay Service (VRS) Task Group published with industry support.[2] However, the joint comments also lay out part of Sorenson's opposition to the FCC's proposal to incorporate the Interoperability Profile for Relay User Equipment into the FCC's rules.[3] As the joint comments demonstrate, incorporating the RUE profile is inappropriate because (1) the designers of the

[1] Further Notice of Proposed Rulemaking, *Structure & Practices of the VRS Program* and *TRS and Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, DA 16-893, CG Docket Nos. 10-51 & 03-123 (rel. Aug. 4, 2016).

[2] SIP Forum Video Relay Service (VRS), US VRS Provider Interoperability Profile, TWG-6-1.0 (Sept. 23, 2015), http://www.sipforum.org/component/option,com_docman/task,cat_view/gid,134/Itemid,261/.

[3] Interoperability Profile for Relay User Equipment, draft-vrs-rue-dispatch-00 (July 20, 2016), https://www.ietf.org/id/draft-vrs-rue-dispatch-00.txt ("RUE profile").

RUE profile did not intend it to apply to provider-distributed endpoints, (2) when encouraging providers to participate in creating the RUE profile, FCC staff assured providers that it would not apply to provider-supplied endpoints, (3) requiring providers to use the RUE profile when designing provider-distributed endpoints would compromise VRS users' security, (4) requiring providers to use the RUE profile when designing provider-distributed endpoints would inhibit competition, and (5) the Bureau lacks authority to adopt the RUE profile into the TRS rules.

Here, Sorenson files separate comments to highlight the impact that incorporating the RUE profile into the Commission's rules would have on Sorenson's property interests. First, Sorenson owns intellectual property ("IP") that any endpoint provider would need to use when implementing the RUE profile. Additionally, adopting the RUE profile and applying it to provider-supplied endpoints would result in a physical occupation of Sorenson's property—in other words, it would effect a taking. Neither the Bureau nor the FCC has Congressional approval to engage in such a taking, and the proposal does not contemplate providing just compensation. Thus, requiring provider-supplied endpoints to comply with the RUE profile would be unconstitutional.

I. Adoption of the RUE Profile Will Implicate Sorenson's IP Rights

Sorenson reminds the Commission that requiring the Accessible Communications for Everyone ("ACE") endpoint (or all provider-supplied endpoints) to meet the RUE profile will implicate Sorenson's IP rights.[4] Although the IETF's "Internet Best Current Practices" ("BCP")

[4] As the joint comments demonstrate, the RUE specification was never intended to, and should not apply to, provider-distributed endpoints. If the Commission nonetheless requires provider-supplied endpoints to comply with the RUE profile, Sorenson would seek appropriate licensing arrangements.

concerning IP rights do not directly apply to the development of the RUE profile,[5] Sorenson has adhered to the letter and spirit of the BCP's disclosure requirements by being transparent about its IP interests.[6] Sorenson has engaged in a policy of fully disclosing the IP rights that Sorenson "believes Cover[] or ultimately may Cover" either a Contribution made by Sorenson or "a Contribution made by another Person" at a very early stage in the process.[7] Specifically, over at least the last fifteen months, Sorenson has repeatedly disclosed to FCC staff and the FCC's contract partners in the ACE program the fact that Sorenson has patents that cover various features disclosed in the several iterations of the proposed RUE profile. These patent disclosures, which detail the current Sorenson patent portfolio, provide notice of Sorenson's IP interests implicated by the current version of the RUE profile—the version that the Bureau has proposed to incorporate into the Commission's rules.

For example, Sorenson provided a list of all of its patents to VTC Secure on May 19, 2015 and to three of its subcontractors on June 2, 2015. In addition, Sorenson sent another letter to VTC Secure on February 9, 2016, reminding it of Sorenson's prior disclosure and providing an updated list of patents. Sorenson expressed its concern regarding the potential for IP disputes relating to the ACE endpoint requirements or code generated by VTC Secure, especially since the final recommendations to the FCC had not yet been specified at that time.

As the Bureau is aware from prior discussions and correspondence, Sorenson has a deep portfolio of patents that may be implicated by the RUE profile. In a further effort to ensure full disclosure (and notwithstanding Sorenson's separately requested clarifications and arguments

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[5] *See* Comments of Convo Commc'ns, CSDVRS, Purple Commc'ns, and Sorenson Commc'ns, CG Docket Nos. 03-123 & 10-51, at 2-4 (filed Sept. 14, 2016) (describing the non-IETF-based process used to develop the RUE profile).

[6] BCP, IP in IETF Tech. § 6.1 (March 2005), www.ietf.org/rfc/rfc3979.txt.

[7] *Id.* §§ 6.1.1, 6.1.2.

against implementation of the RUE profile), Sorenson has reviewed the RUE profile and concluded that either the ACE endpoint or the use of the ACE platform, as the RUE profile is currently drafted, may implicate one or more claims of at least Sorenson's United States Patent Nos. 7,142,643, 7,206,386, 7,016,479, 7,583,286, 7,746,985, and 9,185,211.[8]

Sorenson remains dedicated to working with the FCC to ensure high standards are fostered throughout the industry. To that end, Sorenson welcomes the opportunity to discuss reasonable and appropriate licensing terms for any of its IP that is impacted by the ACE endpoint's implementation of the RUE profile or the use of the ACE endpoint.

II. Requiring Provider-Supplied Endpoints to Conform to the RUE Profile without Just Compensation Would Be an Unconstitutional Taking

For Sorenson's endpoints to comply with the RUE profile, Sorenson would have to build features, with specifications mandated by Bureau fiat, onto the endpoints that it loans or licenses to VRS users. When combined with the FCC's requirement that Sorenson not condition the loan of its equipment or the licensing of its software endpoints to VRS users on the selection of Sorenson as their default provider,[9] requiring the installation of features that would implement the RUE profile constitutes a permanent, physical occupation of Sorenson's property.

The Commission lacks the authority to order Sorenson to allow a permanent physical occupation on its private property. The Takings Clause of the Constitution prohibits the government from taking "private property . . . for public use, without just compensation."[10]

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[8] Other types of ACE technologies, including ACE Direct, ACE Lite, and ACE Connect, may implicate other Sorenson patents. However, Sorenson does not have sufficient information about these technologies to provide the Bureau with a list of specific patents that may be implicated at this time.

[9] Report & Order & Decl. Ruling, *TRS & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, FCC 07-186, CG Docket No. 03-123, ¶ 94 (rel. Nov. 19, 2007) ("Report and Order").

[10] U.S. Const. amend. V.

Because the power of the purse rests with Congress, rather than the executive, agencies may not enact regulations that will necessarily result in a taking that constitutes a "permanent physical occupation," absent clear authorization from Congress to engage in a taking.[11] If a regulation creates "an identifiable class" of applications that would necessarily result in the permanent physical occupation of private property in furtherance of a public purpose, it is invalid unless (1) "any fair reading" of the statutory basis for the regulation gives the FCC the authority to engage in a physical taking, or (2) Congress implicitly gave the FCC the authority to engage in a physical takings because "the grant of authority itself would be defeated unless takings power were implied."[12] This rule applies equally to personal (as opposed to real) property.[13]

Because the Bureau and the Commission do not have Congressional approval and would not provide just compensation for allowing a permanent physical occupation of Sorenson endpoints, it cannot incorporate the RUE profile into the Commission's interoperability rules.

A. Incorporating the RUE into the Commission's rules would amount to a permanent physical occupation for all VRS providers that loan provider-supplied VRS equipment to VRS users.

As explained in Sorenson's joint comments, the RUE profile, as currently drafted, purports to govern all provider-distributed endpoints and not just the ACE endpoint, which expands application of the specification far beyond its intended purpose. Because the Bureau

[11] *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994); *see also Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (explaining that, with a permanent physical occupation, a taking occurs "no matter how minute the intrusion, and no matter how weighty the public purpose behind it.").

[12] *Bell Atlantic*, 24 F.3d at 1445-46.

[13] *Horne v. Dep't of Agric*., 135 S. Ct. 2419, 2426 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

has not explained why it would apply the RUE profile to provider-distributed endpoints, Sorenson can only speculate about the purpose of doing so. However, it may be that the Bureau hopes that incorporating the RUE profile into the rules would facilitate device portability—*i.e.*, that it would enable users who have borrowed a device from Sorenson to port that device to another provider. This would plainly constitute a taking. By (1) forbidding Sorenson (and other VRS providers) from reacquiring Sorenson equipment or discontinuing the license to software-based endpoints if the user chooses a different default provider[14] and (2) ordering Sorenson (and other VRS providers) to build special features into their endpoints that enable the endpoints to be used seamlessly with another provider's service after a user has ported his or her number, the Bureau would effect a permanent physical occupation of Sorenson endpoints.

When a government regulation interferes with some of the most basic property rights, such as the power to exclude others from the property, it has effected a permanent physical occupation.[15] "Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish" that a permanent physical occupation has occurred, "it is clearly relevant."[16]

To have its endpoints comply with the RUE profile, Sorenson would need to build features into each endpoint that is designed to meet the specifications contained in its standard. These required features would permanently reside on Sorenson's endpoints. Furthermore, the features would be specifically designed to make it as easy as possible for a Sorenson competitor to offer VRS services on a Sorenson endpoint. Sorenson would then be precluded from re-acquiring its property, even if Sorenson stands to gain little to no financial benefit from the VRS

[14] Report & Order ¶ 94.

[15] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982).

[16] *Id.* at 436.

user's continued possession of the equipment or license to use a software-based endpoint. Indeed, Sorenson actually must continue to pay the costs associated with obtaining licenses for third-party software installed on its endpoints, continually upgrading its endpoints to ensure ongoing interoperability and fix bugs, and providing technical support for the endpoints.

Access to communications equipment, apps, or networks without the consent of the property owner is a violation of a property owner's right to exclude, and constitutes a trespass.[17] Therefore, forcing Sorenson build features into its endpoints would amount to a trespass.

Admittedly, a trespass that occurs from the government-mandated features on a given piece of equipment or app may not always amount to a "taking" in the constitutional sense; this is because a trespass that occurs from the government regulation of the *use* of property does not always amount to a taking.[18] But where a government's regulatory regime *as a whole* "effectively destroys" key property rights, the trespass that occurs from the government-mandated feature on a given piece of equipment rises to the level of a permanent occupation.[19] Put another way, agencies cannot enact regulatory regimes that amount to giving "an interloper . . . a government license" to occupy private property without consent.[20]

In light of the FCC's overall regulatory treatment of VRS providers, requiring provider-supplied endpoints to comply with the RUE profile rises to the level of a permanent occupation without just compensation. The Bureau's proposal would force Sorenson to build features into

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[17] *See Fidlar Techs. v. LPS Real Estate Data Sols., Inc*., 82 F. Supp. 3d 844, 859 (C.D. Ill. 2015), *aff'd*, 810 F.3d 1075 (7th Cir. 2016) (citing cases).

[18] *See Loretto*, 458 U.S. at 435-36.

[19] *Id.*; *see also Horne*, 135 S. Ct. 2419 (evaluating a regulatory regime as a whole when determining whether the government effected a taking).

[20] *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001) (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253–54 (1987)); *see also Bell Atlantic*, 24 F.3d at 1446.

its endpoints that would be expressly designed to facilitate giving Sorenson's competitors access to Sorenson endpoints. When a VRS user selects one of Sorenson's competitors as his or her default provider, a Sorenson competitor would receive all or most of the economic benefit associated with the use of the Sorenson endpoint, and free-ride on the costs Sorenson pays to develop its IP, to license software from third parties, and to maintain the endpoints. Despite its inability to make a reasonable profit and the continuing costs that Sorenson must pay to maintain the endpoint, FCC regulations prevent Sorenson from re-acquiring the endpoint, and also exclude that endpoint from compensable costs. Under these circumstances, the trespass mandated by the Bureau (i.e., the required incorporation of RUE-compliant features on each Sorenson endpoint) becomes a permanent, physical taking of the Sorenson endpoint without just compensation.

B. The Bureau does not have Congressional authorization or provide for just compensation.

The FCC could require all providers to comply with the RUE profile while avoiding the constitutional issue, if it were to (1) get Congressional authority to do so,[21] and (2) provide "commercially reasonable payment" for the use of Sorenson's endpoints by other VRS providers.[22] However, the FCC has done neither. It has never even asked for Congressional authority to permanently occupy Sorenson and other VRS providers' endpoints. And it has steadfastly declined to reimburse providers for any of the costs associated with endpoint equipment.[23] Thus, the Bureau may not constitutionally require Sorenson or any other VRS provider to make its endpoints RUE-compliant.

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[21] *Bell Atlantic*, 24 F.3d at 1446; *GTE Sw. Inc. v. Pub. Util. Comm'n of Texas*, 10 S.W.3d 7, 13 (Tex. App. 1999).

[22] *Cellco P'ship v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012).

[23] Notice of Proposed Rulemaking, *TRS & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 23 FCC Rcd. 10663, 10670 (2008) ("[T]he Commission has made clear

CONCLUSION

For the reasons stated in these comments and in its concurrently filed joint comments, Sorenson requests that the Commission only require that the ACE endpoint—and not provider-supplied endpoints—comply with the RUE profile. Sorenson welcomes a continued dialogue with the Commission and its partners regarding appropriate licensing arrangements for Sorenson's IP, as the FCC continues its work to launch the ACE endpoint.

Dated: September 14, 2016

Respectfully Submitted,

/s/ Adrienne E. Fowler

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that the costs of customer equipment, equipment distribution, and installation of the equipment or any necessary software is not compensable from the Fund.").